

basis, to their estimate of RM36,000, must be added the further cost of one 20 foot container amounting to say RM9,000 to get a total of RM45,000. At current rates of exchange (£1 = RM3.85) that is equivalent to over £11,000. In 1991 the exchange rates of pounds sterling and US dollars in relation to the Malaysian Ringgit was probably different from the current rates. That is another fluctuation that the defendants do not appear to have taken into account. They have not informed the Court what the relevant exchange rate was. In April/May 1991 if the rate was RM4.50 to the pound the estimate of the defendants themselves amounts to something like £10,000 which is not far out from the actual amount said to have been incurred by the plaintiffs. The defendants allowed the equipment to be shipped by an OCL vessel and they cannot now say a tramp or in any event a non-conference vessel should have been used. This point also does not provide any *bona fide* triable issue.

For the defendant much was sought to be made of an allegation of the plaintiff having at some earlier date cheated the defendant of certain monies due to it. I failed to see the relevance of that in respect of the issues in respect of this claim.

The appeal had to be and was dismissed with costs.

Reported by Shamsiah Begum Subhan

a

LIONG PONG HUONG

v.

**NYAN SIU LAN @ NGAN SIEW LAN (F)
AND WONG SIEW LENG (F)
(INTERVENER)**

b

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[SUIT NO. KG. 164 OF 1983
CONSOLIDATED WITH SUIT NO. KG
599 OF 1986]
7 AUGUST 1993

c

CONTRACT: Whether agreement a sham - Plaintiff knew what he was signing - Sanctity of agreement - No dealing clause - Effect of such restriction.

d

Pursuant to an agreement dated 8 January 1974 (said agreement) the plaintiff sold to the defendant a parcel of land together with a double storey semi-detached house (said property). The plaintiff admits that the said agreement was explained to him by a lady in the lawyers' office and that he knew what he was signing. But the plaintiff also says that he was signing for the purpose of obtaining a loan. Subsequently the defendant entered into an agreement with the intervener to sell the said property to her.

e

The plaintiff filed the suit to declare the said agreement null and void on the grounds that the agreement was a sham and was only to better secure the loan of RM5,000 given to him by the defendant. Also on the ground that the document of title has a "no-dealing clause".

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Held:

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[1] Having considered the conduct of the parties, and the circumstances on the balance of probabilities the said agreement is not a sham designed to better secure a loan taken by the plaintiff from the defendant.

h

[2] Clause 2 of the agreement clearly stipulated that the sum of RM8,000 was paid and the receipt was thereby acknowledged. The plaintiff admitted knowing what he was signing and as such he should be bound by it. The sanctity of legally binding agreements should be protected and no one should be allowed to retract from them by mere denial without more.

i

[3] Pursuant to clause 3 of the said agreement the parties left it open-ended and flexible with

**Liong Pong Huong v. Nyan Siu Lan @ Ngan Siew Lan (F)
And Wong Siew Leng (F) (Intervener)**

[1993] 4 CLJ

Richard Malanjum JC

585

regard to the transfer. It could have been if consent was obtained or when the restriction has lapsed. Clause 3 can be taken as the provision imposed by the said restriction. It follows that since no immediate transfer was anticipated by the parties upon the execution of the said agreement but conditional the said agreement is not illegal and void *ab initio*. The said agreement is valid and enforceable.

[Plaintiff's claim dismissed. Defendant's counter-claim allowed].

Cases referred to:

Foakes v. Beer [1884] 9 App. Cas 605 (**cit**)
Chin Tai v. Siow Shiaw & Ors. [1971] 1 MLJ 67 (**foli**)
Arul s/o Arulanendhu v. Manickam @ Perumal s/o Angamuthu [1992] 3 CLJ 1415 (**cit**)

Legislation referred to:

Sarawak Land Code, s. 33

For the plaintiff - Lau Mei Ling; M/s. Sim & Yee
For the defendant - Christina Eng; M/s. C.J. Eng
For the Intervener - Ivan Ong; M/s. Lim Tan & Partners

JUDGMENT

Richard Malanjum JC:

In this hearing of two consolidated actions, the plaintiff in the first action (hereinafter called "KG.164/83") is claiming against the defendant the following relief:

- (a) a declaration that the agreement dated 8 January 1974 entered between the plaintiff and the defendant is a sham agreement;
- (b) such other relief as the Honourable Court thinks fit and proper; and
- (c) costs.

The defendant disputes the claim and has filed besides her defence a counterclaim praying for the following:

- (a) specific performance of the agreement dated 8 January 1974 between the plaintiff and the defendant by transferring to the defendant all the plaintiff's right title share and interest in that parcel of land situated at Bintawa Fishing Village, containing an area of 0.0639 acre, more or less, and described as Lot 105 Section 66 Kuching Town Land District;
- (aa) that the plaintiff Liong Pong Huong by himself or through his agent representative or servant produce the document of title to Lot 105 Section 66 Kuching Town Land District within such period of time as the Court may order;

- a (b) such further or other relief as the Court deems fit; and
- (c) costs.

In the second action (hereinafter called "KG.599/86") the plaintiff therein who is also the intervener in KG.164/83 claims against the same defendant as in KG.164/83 for the following relief, namely:

- b (1) specific performance of the said agreement dated 25 February 1974;
- (2) that the said land described as Lot 105, Section 66, Kuching Town Land District together with the building thereon be registered in her name as Purchaser/Transferee free from all encumbrances;
- (3) damages for the breach of contract in addition to specific performance;
- (4) further or other relief as this Honourable Court shall deem just and fair; and
- (5) costs.

- c
- d No defence was filed by the defendant in KG.599/86. Instead the defendant joined the plaintiff of KG.164/83 as third party to KG.599/86. Subsequently, both actions were consolidated by order of Court dated 2 November 1987. Further, the plaintiff in KG.599/86 obtained an order on 1 December 1988 to be added as an Intervener in KG.164/83.
- e

At the commencement of the hearing learned Counsel for the plaintiff in KG.599/86 applied with the learned Counsel for the defendant agreeing that if the finding of the Court in KG.164/83 is in favour of the defendant in that action then the defendant will admit her liability to the plaintiff in KG.599/86. In essence therefore it is KG.164/83 that has to be determined foremost.

A. KG.164/83:

- f
- g The parties in KG.164/83 have agreed on the following facts:

1. That Wong Siew Leng (f) was in actual possession and occupation of premises on that parcel of land containing an area of 0.0639 acres, more or less, situate at Bintawa Fishing Village Kuching and described as Lot 105 Section 66 Kuching Town Land District (hereinafter referred to as "the said property"), since 14 January 1974.

- h 2. That Wong Siew Leng paid the following:

- i (a) all sum or all sums due and owing to the Housing & Development Commission (HDC) under the loan granted by HDC to Liong Pong Huong (BIC K

489765) in respect of the said property from around 8 December 1973 and continued to make payment until full settlement of the said loan in January 1979. All receipts of payments thereof are in the possession of Wong Siew Leng;

- (b) all the premium and annual rent in respect of the said land from 7 January 1974 to date, the rent booklet which is in the possession and custody of Wong Siew Leng; and
 - (c) all rates, capital contribution for electricity supply, connection fee for water supply and subsequent monthly bills in respect of water and electricity consumed at the said property during the entire period of occupation by Wong Siew Leng.
3. That Wong Siew Leng commenced payment to HDC with receipts No. 1281 to 1284 both dated 8 December 1973.
 4. That the plaintiff in Suit No. KG.164 of 1983 never occupied the said property.
 5. That the house in dispute is House No. 200 Lot 105 Section 66 Kuching Town Land District.

In opening her case as well as in her final submission learned Counsel for the plaintiff in KG.164/83 submitted that the basis of the claim of the plaintiff is mainly on the issues:

- (i) that the agreement dated 8 January 1974 (hereinafter called "the said agreement") entered into between the plaintiff and the defendant was a sham and was only to better secure the loan of RM5,000 given by the defendant to the plaintiff and that there was no *bona fide* sale and purchase of the said property together with a double-storey semi-detached house;
- (ii) further or in the alternative, there was a failure of consideration thereby resulting in the said agreement being null and void; and
- (iii) that the said agreement is illegal in view of the existence of 'no-dealing clause' in the document of title of the said property.

I shall therefore proceed to examine the evidence adduced first and then on the issues aforementioned before coming to a decision for KG.164/83.

At the outset however, I must state that having heard and considered the testimonies of the plaintiff and the defendant and their witnesses I do find discrepancies in their evidence. But I have cautioned myself that the long lapse of time might be the probable culprit for producing

a such a consequence. I have therefore taken into consideration such element in assessing the evidence adduced by the parties.

I: Plaintiff's version:

The pertinent aspects of the evidence of the plaintiff under examination in chief are as follows:

- b* (a) that he was a good friend of the husband of the defendant (DW1) and he trusted him;
- (b) that he had taken a loan of RM5,000 from the defendant in 1974 but did not receive the money as it was 'set-off' for the Yamaha engine which he bought from DW1 at the cost of RM35,000;
- c* (c) that he did sign the said agreement (Ex. P1) in a lawyer's office;
- (d) that he did not know the purpose of the said agreement;
- d* (e) that he had no intention of selling the said property and if he wanted to sell it would not have been that cheap;
- (f) that he allowed the defendant to stay in the semi-detached house of the said property as DW1 told him that the defendant did not have a place to stay. (For convenience I shall refer the semi-detached house on the said property as "House No. 200" in this Judgment);
- e* (g) that no rental was paid by the defendant;
- (h) that he never received RM8,000 for the said property;
- f* (i) that he could not remember if he paid the instalment payments for the said property to the Housing and Development Commission;
- (j) that he did offer RM36,000 to DW1 in return for the said property after DW1 told him of the amount if he wanted it back. However DW1 subsequently did not accept;
- g* (k) that it was him who took out the title deed of the said property from the Lands & Surveys Department;
- (l) that he also signed the memorandum of charge dated 11 January 1974 (Ex. P2);
- h* (m) that he did not stay in House No. 200 being not a Heng Hua; and
- (n) that he subsequently knew that the said property was sold to the intervener (Wong Siew Leng) (PW4).

i Under cross-examination the plaintiff admitted that the said agreement was explained to him by

a lady in the lawyer's office and that he knew what he was signing. But plaintiff said that he was signing for the purpose of obtaining a loan. He also said that to date he has not repaid the loan of RM5,000 to the defendant. The plaintiff further said that he knew the said property had been sold before he went to collect the document of title. The plaintiff went on to explain that no rental was collected from the defendant as she was to pay for the instalment payments. He agreed however that there was no fixed period for the defendant to occupy House No. 200. It was also admitted by the plaintiff that on his only visit to House No. 200 with DW1 he saw it was being renovated but he said nothing. When asked about his means of getting RM36,000 the plaintiff said that he took a loan from a fisherman 'towkey' and it was only done orally. It is also interesting to note that the plaintiff agreed that he took advantage of the non-transfer of the said property in commencing this action KG.164/83.

The plaintiff next called Mr. Mark Chin (PW2) the advocate who attested the signatures on the said agreement and Ex. P2. This witness said that Ex. P2 could have been prepared by his former legal firm, Cheng & Co., as clause 6 of the said agreement stipulated that the parties agreed to have a memorandum of charge prepared and a caveat to be lodged concurrently. He said without hesitation that Ex. P2 was prepared to enable the caveat to be lodged against the said property. He also said that the said agreement was a 'straight sale and purchase agreement'. But he could not remember if there was payment of the purchase price. This witness also explained that the parties knew of the special condition attached to the said property, that is, no dealing provision for 10 years and that was reflected by the exemption clause in the said agreement in favour of his former legal firm.

II: The defendant's version:

The defendant in her testimony said that she never lived in House No. 200. She purchased it and had it renovated. Subsequently she sold it to the intervener. The defendant also said that the plaintiff never told her that he did not want to sell the said property and she was never approached with the RM36,000 by the plaintiff in return for the said property. As regards the loan of RM5,000 the defendant said that the plaintiff owed her husband and not to her. She also confirmed that it was her husband who

a gave the instruction to have the said agreement prepared and she knew that the said agreement was for her to purchase the said property from the plaintiff.

b Under cross-examination the defendant maintained that the purchase money was paid by her husband to the plaintiff and she merely signed the said agreement. But later on she agreed that she never saw her husband handing over the sum of RM8,000 being the purchase price to the plaintiff.

c When being confronted with Ex. P2 (memorandum of charge) the defendant said that she knew she was the chargee but she maintained that the plaintiff did not owe her any money. The defendant was also asked as to why the said property was used as a security for the loan of RM5,000 if it was already purchased by her. In reply the defendant pleaded ignorance but did not agree to the suggested reason that it was because the plaintiff had never intended to sell the said property.

d As to why the said property was not transferred to her upon purchase the defendant replied that she was told by the plaintiff that no transfer could be effected before the lapse of 10 years after the signing of the said agreement. She further stated that after the expiry of the 10 years period she gave notice to the plaintiff to effect the transfer.

e The defendant also said that she bought the said property as she did not have a house at that time. But she did not stay there subsequently as at that time she only had one child of about 3 years old and she did not dare to live there as it was isolated and surrounded by jungle.

f The defendant also maintained that it was her husband who told her that she was purchasing the property when she signed the said agreement. She also said that when she sold the said property to the intervener, Wong Siew Leng, she merely signed the agreement (Ex. P3) and she did not receive the money as it could have been paid to her husband.

g The husband of the defendant (DW1) gave evidence for the defence. His evidence may be summarised as follows:

- h**
- (i) that he negotiated with the plaintiff in connection with the said agreement;
 - (ii) that he paid RM4,000 cash to the plaintiff as part payment for the purchase price of
- i**

RM8,000 in order to get the keys of the House No. 200. The balance was used to pay the instalments with Housing and Development Commission on monthly payment of RM83 per month;

- (iii) that it was the plaintiff who gave instruction to have the said agreement and Ex. P2 prepared;
- (iv) that the plaintiff still owed him RM5,000 which was a personal debt;
- (v) that it was the plaintiff who wanted to sell the said property as he did not want to stay there;
- (vi) that before the said property was sold he renovated the House No. 200 which cost him about RM8,000;
- (vii) that the plaintiff never came to see him for the return of the said property and when he met him on two occasions the plaintiff never mentioned about the said property; and
- (viii) that the plaintiff never offered RM36,000 to him in return for the said property.

Under cross-examination by learned Counsel for the plaintiff DW1 stated that he has no receipt for his payment of RM4,000 to the plaintiff. He also said that the RM4,000 payable to the Housing and Development Commission was paid by the intervener. He maintained however that the plaintiff owed him RM5,000 of which Ex. P2 was the security document though his name did not appear on it. As for the bills for the renovation this witness said that he did not keep receipts of 20 years ago.

III: *The issues:*

In considering the issues as presented by learned Counsel for the plaintiff I am of the view that assessment of the respective versions of the parties is essential. I shall therefore proceed to do so while dealing with the issues in sequence as above.

(a) *Issue (i):*

It was the contention of the plaintiff that the said agreement was a sham and that he never intended to sell the said property including House No. 200. But having considered the evidence as a whole adduced in this case, including the conduct of the parties and the circumstances, it is my finding that on the balance of probabilities the contention of the plaintiff cannot be sustained.

- a* The said agreement is self-explanatory. The plaintiff admitted under cross-examination that the contents were explained to him by a lady in the legal firm and he knew what he was signing. However the plaintiff justified his action by saying that the said agreement was to secure a loan. But if that was so then his subsequent conduct after its execution did not support such a justification. In his own words the plaintiff said that he visited House No. 200 only once when DW1 brought him. During that visit House No. 200 was under renovation but the plaintiff did not query. He also did not ensure that the repayments on the instalments to Housing and Development Commission were met. It appears to me that he did not show any concern for it in a way reasonably expected of an owner of a house. Such conduct in my view tends to indicate that this action was commenced as he was dissatisfied with the selling price of the said property and after all it has not been transferred to the defendant.

- e* As to the argument that the said agreement was executed only to better secure a loan taken by the plaintiff, I am in doubt in the light of the evidence adduced. By his own admission the plaintiff said that he has not repaid the loan. He was also uncertain from whom he took the loan. At first he said that he took it from the defendant but subsequently he testified that he never received the money and later on he said that the loan was to 'set-off' the cost of the Yamaha engine he bought from the company where DW1 worked at that time. It was not made clear how this 'set-off' arrangement was done in view of the fact that DW1 was only an employee of the company from which the Yamaha engine was bought. Unfortunately, even the evidence of the defendant and DW1 did not help to clarify the matter. The subject became more puzzling when the defendant denied giving any loan to the plaintiff stating that it was from her husband DW1. But there was no explanation as to why Ex. P2 was made between the defendant and the plaintiff.

- g* Meanwhile Mr. Mark Chin (PW2), the advocate who attested the signatures of the parties in the said agreement and Ex. P2 testified that Ex. P2 was prepared to enable the caveat to be lodged against the said property. He also said that clause 6 of the said agreement stipulated the preparation of a memorandum of charge and a caveat to be lodged. With that I am of the view
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- i*

that the probable version on this matter is that of PW2. As to why the sum of RM5,000 was specified in Ex. P2 was not explained but I do not think it affects the probability of the version of PW2.

I am further convinced of the probability of the version of PW2 in that the letters written by the advocates of the plaintiff in the early stage of the dispute do not indicate otherwise. For instance the letter from M/s. Y.O. Leong dated 23 June 1982 acting for the plaintiff to the defendant (p. 23 of Ex. 1 - Bundle of Agreed Documents) made reference to refund of all monies paid by the defendant to the plaintiff under the said agreement. Under the said agreement the sum of RM8,000 was stated. If there was such a loan then Ex. P2 should have been looked at which only stated the sum of RM5,000. And that sum which was also stated by the plaintiff in evidence should have been offered in that letter instead of all monies paid under the said agreement if indeed there was a loan taken.

On this issue (i) it is therefore my finding on the balance of probabilities that the said agreement is not a sham designed to better secure a loan taken by the plaintiff from the defendant.

(b) Issue (ii):

The plaintiff also said that the said agreement was null and void and of no effect as there was a failure of consideration.

In view of my finding on issue (i) above the answer to this issue has to be in negative. Clause 2 of the said agreement clearly stipulated that the sum of RM8,000 was paid and the receipt was thereby acknowledged. The plaintiff admitted knowing what he was signing and as such he should be bound by it. The sanctity of legally binding agreements should be protected and no one should be allowed to retract from them by mere denial without more.

It was also submitted on behalf of the plaintiff that even if there was the payment of RM5,000 in the form of a loan, such payment of a lesser sum was not consideration for the satisfaction of a larger sum which was RM8,000 as stipulated in the said agreement. The case of *Foakes v. Beer* [1884] 9 App. Cas. 605 was cited.

On the assumption that only RM5,000 was paid (which is contrary to my finding) it would not necessarily make the said agreement null and void for want of consideration. There might be a

a partial failure of consideration which entitled the aggrieved party to terminate or to sue for breach of contract. However as the action of the plaintiff here is not on the ground of breach I do not think I have to make a finding on the subject and would be pointless in view of my foregoing finding on this issue (ii).

b (c) *Issue (iii):*

c The plaintiff next contended that the said agreement was illegal in view of the existence of "no dealing" clause in the issue document of title to the said property and the said agreement was without any provision for consent to be obtained from the Director of Lands and Surveys and in fact no consent was secured.

Under item (ii) of the Restrictions and Special conditions in the issue document of title of the said property it is stipulated as follows:

d No dealing affecting this land may be effected without the consent in writing of the Director of Lands and Surveys during the initial period of ten (10) years from the date of registration of this lease.

The date of registration of the lease in respect of the said property was on 18 December 1973.

e Further in the event of a continuing breach of such a restriction s. 33 of the Sarawak Land Code (the Code) provides for the consequences which include forfeiture and re-entry besides being an offence. However I did not find any nor informed by learned Counsel of an existence of a provision in the Code which specifically taint with illegality such document as the said agreement.

f Anyway, it is to be observed that the restriction imposed is not one of absolute prohibition but a qualified one. Thus dealing in the said property could have been done either with the consent of the Director of Lands and Surveys if before the expiry of the initial 10 years period or upon the expiry of the 10 years period as the restriction by then would have lapsed.

g What therefore is the status of the said agreement in relation to the said restriction? Clause 3 of the said agreement provides:

The transfer of the said land shall be effected as soon as feasible.

h My reading of clause 3 is that the parties left it open-ended and flexible with regard to the transfer. It could have been done if consent was

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obtained or when the restriction has lapsed. In my view therefore clause 3 can be taken as the provision intended to meet the qualification imposed by the said restriction. It follows that since no immediate transfer was anticipated by the parties upon the execution of the said agreement but conditional I do not think the said agreement is illegal and void *ab initio* and I so hold.

Indeed in the Federal Court decision of *Chin Tai v. Siow Shiow & Ors.* [1971] 1 MLJ 67 his Lordship Ong CJ (Malaya) with the concurrence of the other members of panel held that the existence of restriction in the issue document of title (of the same nature as in the present case) did not taint the agreement made thereof with illegality. In that case it also involved the sale of a piece of 6-acre land which issue document of title had a restriction thus:

The land hereby alienated shall not be transferred, charged or leased for a period of 10 years except with the express permission in writing of the Collector of Land Revenue, Jelebu.

Further, the agreement entered into between the parties in that case did not provide any condition to secure the permission of the Collector of Land Revenue Jelebu. In allowing the counterclaim of the purchasers/respondents his Lordship said on p. 69 B-C:

... At the time when the agreement was made the Land Code (F.M.S. Cap.138) was in force and there is authority for saying that contracts of the type made in this case suffered from no taint of "illegality" see *Malaya Borneo Building Society Ltd. v. Ramchandran* [1959] MLJ 182. Nor, so far as I am able to advise myself, does any such taint attach to the transaction under any of the provisions of the National Land Code 1965. Such being the case, the agreement of 13 April 1960 must be held valid. The only impediment to a transfer by way of specific performance as prayed in the counterclaim, is a requirement of the necessary permission.

Chin Tai's case (supra) was followed by Lim Beng Choon J. in *Arul s/o Arulanendhu v. Manickam @ Perumal s/o Angamuthu* [1992] 3 CLJ 1415.

Similarly, in the present case (and as was said earlier on in this judgment) I find no provision in the Code which attaches taint of illegality to the said agreement. Accordingly, on the foregoing authorities I also rule that the said agreement must be held valid and enforceable.

a (d) *Clause 4 of the said agreement*

Clause 4 reads:

- b** If the vendor within two weeks on receipt of notice from the purchaser fails or refuses to execute transfer of the said land to the purchaser as described in clause 3 hereabove, then he shall refund the said sum of Dollars eight thousand only (\$8,000) to the purchaser within three (3) days after the expiration of the term in addition to another sum of Dollars eight thousand only (\$8,000) as pre-estimated liquidated damages, plus whatever outstanding accounts the purchaser has paid to the Housing and Development Commission, Kuching, and this agreement shall then be regarded as null and void.
- c**

Learned Counsel for the plaintiff submitted that clause 4 provided the option to the plaintiff whether or not to proceed with the transaction. With respect, at this stage (or for that matter when this action was commenced), I find no evidence of the plaintiff having performed or offered to perform his obligation under that clause. As he had the benefit of the services of advocates such a task would have been done if he wanted to. Instead he proceeded on other grounds to nullify the said agreement. Although specific performance is an equitable relief and discretionary, I do not think good conscience allows the plaintiff to be given the relief he now seeks.

IV. Conclusion and Orders:

- f** On the basis of my findings on the issues aforementioned it is my judgment that the action of the plaintiff must be dismissed. On the other hand and arising from my findings on the issues I hereby order the grant of the relief sought for by the defendant in her counterclaim in particular prayers (a), (aa) and (c). Since the restriction imposed in the issue document of title has now lapsed there is no question of consent to be obtained prior to the transfer of the said property. The plaintiff by himself or through his agent, representative or servant is to produce the issue document of title to the said property to the Senior Assistant Registrar of High Court III, Kuching within seven (7) days from the date hereof.
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B. KG.599/86:

- i** In view of the prior agreement between the plaintiff and the defendant in this second action at the commencement of this trial and as my finding is in favour the defendant in KG.164/83

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The various issues for the Court were:

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